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No. 92-602

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER
and STEVEN LONG,

Petitioners,

v.

MELVIN HICKS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AND THE EQUAL OPPORTUNITY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Hugh Joseph Beard, Jr.
THE EQUAL OPPORTUNITY FOUNDATION
1747 "S" Street, NW
Washington, DC 20009
(202) 543-0411

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
1705 "N" Street, NW
Washington, DC 20036
(202) 857-0240

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QUESTION PRESENTED

In an employment discrimination action brought pursuant to Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1983, is judgment for the employee *compelled*, as a matter of law, by a finding that the employer's stated non-discriminatory reasons for adverse employment action are not the employer's actual reasons?

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND THE EQUAL OPPORTUNITY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to ensuring that a proper balance is achieved between (on the one hand) the rights of employees not to be subjected to invidious discrimination by their employers and (on the other hand) the rights of employers not to be subjected to unwarranted government intrusion into their business affairs.

To that end, WLF has appeared before this Court as well as other state and federal courts in cases dealing with federal employment discrimination laws. – *See, e.g., Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991); *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991); *Int'l Union v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

The Equal Opportunity Foundation is a nonprofit educational organization founded in 1987 dedicated to establishing in America a colorblind government in a colorblind society, and, to that end, to protecting the civil rights of all Americans. It is concerned that should employment discrimination laws be construed so as to permit plaintiffs to prevail in disparate treatment cases even without demonstrating directly or indirectly that the employer acted with invidious discriminatory intent, the clear language of the Civil Rights Acts, as well as their moral and constitutional justification, will be perverted.

Amici are concerned that employment discrimination laws -- both by imposing subtle pressure on employers to resort to "quotas" and by interfering in nondiscriminatory business decisions by employers -- are imposing tremendous costs on the free enterprise system and on society as a whole. For example, a recent *Forbes* Magazine article estimated the *annual* costs to the economy of affirmative action and quota hiring at $350 billion. *See* P. Brimelow and L. Spencer, "When quotas replace merit, everybody suffers," *Forbes* (Feb. 15, 1993).

Amici believe that their experience in litigating issues of this sort may prove of assistance to the Court in its consideration of this case. *Amici* submit this brief in support of Petitioners with the written consent of all parties. The written consents are on file with the Clerk.

STATEMENT OF FACTS

In the interests of economy, *amici* hereby adopt by reference the Statement of the Case contained in Petitioners' brief.

In brief, Petitioners are St. Mary's Honor Center ("St. Mary's"), a minimum security correctional facility operated by the Missouri Department of Corrections and Human Resources; and Steven Long, who was the superintendent of St. Mary's during 1984-85. Respondent Melvin Hicks was a shift commander at St. Mary's from 1980 until his demotion and eventual discharge for alleged misconduct in 1984. Hicks, an African-American, alleges that he was demoted and discharged because of his race.

Hicks filed suit in 1988 in federal district court in Missouri alleging that, by discharging him on the basis of race, St. Mary's violated his rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and Long violated his rights under the Equal Protection Clause of the Fourteenth Amendment. Petition Appendix (Pet. App.) A1-A2. After a non-jury trial in June 1990, the district judge entered judgment in favor of Petitioners. Pet. App. A14-A30.

The district court found initially that Hicks had established a *prima facie* case of race discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Pet. App. A22-A23. Because Hicks had established a *prima facie* case, the district court held, the burden then shifted to Petitioners to articulate a legitimate, non-discriminatory reason for the demotion and discharge. Pet. App. A23. The district court held that Petitioners met that burden by setting forth two reasons for their conduct: the severity and the accumulation of violations of prison rules committed by Hicks. *Id.*

The district court went on to find that Hicks had demonstrated that the explanations proffered by Petitioners were not Petitioners' actual motivation. The court found

that although Hicks committed several violations of institutional rules, he "was treated much more harshly than his co-workers who committed equally severe or more severe violations." Pet. App. A26. The district court nonetheless found that Hicks had failed to carry his ultimate burden of proving "by direct evidence or inference" that race was the determining factor in his discharge decision. Pet. App. A30. The district court suggested two unarticulated reasons for Hicks's discharge: (1) nonracial personal animosity against Hicks on the part of his supervisors; and (2) a desire for "full-scale removal of employees from supervisory positions" at St. Mary's in light of its reputation as a poorly run institution.[1] Pet. App. A27-A28. Accordingly, the district court dismissed the suit.

The United States Court of Appeals for the Eighth Circuit reversed and directed that judgment be entered for Hicks. The Eighth Circuit held that when (as here) a trier of fact finds that an employment discrimination plaintiff has established a prima facie case of race discrimination and that the nondiscriminatory reason(s) articulated by the employer for its conduct are "pretextual," the plaintiff has met his burden of persuasion, and the trier of fact is *required* to enter judgment for the plaintiff. Pet. App. A10-A12.

Significantly, the Eighth Circuit did not find that the district court committed a clear error of fact in finding that invidious discrimination was not a motivating factor in the decision.

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[1] A 1983 state investigation of St. Mary's concluded that the institution was being poorly run. Pet. App. A2. As a result, its white superintendent was discharged in early 1984; and Hicks, at the time of his April 1984 demotion, was the only pre-1984 St. Mary's supervisor still holding his job. Pet. App. A15.

SUMMARY OF ARGUMENT

The decisive issue in any disparate treatment employment discrimination case is whether the employer acted with invidious discriminatory intent in taking the disputed employment action. The Court has repeatedly emphasized that in such cases the burden of persuasion on the issue of discriminatory intent remains on the plaintiff at all times.

Yet, in directing that judgment be entered for Hicks, the court of appeals in this case in effect held that a plaintiff may prevail in such cases even without carrying his burden of demonstrating -- by either direct or circumstantial evidence -- that the defendant intentionally engaged in prohibited discrimination. The district court found that Hicks had *not* carried that burden, and the court of appeals did not hold that any of the district court's factual findings were clearly erroneous. Accordingly, the court of appeals's holding that a plaintiff *must* prevail in these circumstances improperly shifts the burden of persuasion away from the plaintiff.

The court of appeals fell into error due to its fundamental misunderstanding of the nature of a "presumption." In order to assist trial courts in addressing employment discrimination claims, the Court in *McDonnell Douglas* and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), held that a plaintiff raising such claims creates a rebuttable "presumption that the employer unlawfully discriminated against" him by proving certain facts, generally referred to as a "*prima facie* case." *Burdine*, 450 U.S. at 254. To rebut that presumption, the defendant must come forward with evidence suggesting a legitimate, nondiscriminatory reason for its conduct toward the plaintiff. *Id.* If the employer does so, the *McDonnell-Burdine* presumption "drops from the case" and the factual inquiry then focuses directly on the ultimate issue of discriminatory intent. *Id.* at 255. In sum, the *McDonnell-Burdine* presumption is of no further effect or relevance

once the employer comes forward with evidence of a nondiscriminatory reason for its conduct.

The court of appeals attempted to read far more strength into the *McDonnell-Burdine* presumption than was ever intended by Congress or this Court. The court of appeals refused to allow that presumption to "drop[] from the case" once Petitioners came forward with the requisite rebuttal evidence. Rather, the court of appeals insisted that the presumption is revived once a plaintiff shows that the rebuttal evidence offered by the defendant is "pretextual." Pet. App. A10-A12. That interpretation of the presumption not only conflicts with this Court's precedents, but also flies in the face of Rule 301 of the Federal Rules of Evidence, which governs the use of presumptions in federal courts.

Rule 301 was adopted by Congress in 1975 (as part of the Federal Rules of Evidence) and incorporates the view of the effect of presumptions articulated by Harvard Professor James B. Thayer in 1898. Under Thayer's narrow view of presumptions, once a presumption has been met by admissible evidence to the contrary, it vanishes. Neither the language of Rule 301 nor its legislative history allows any other interpretation. Since civil rights litigation is to be governed by the ordinary procedural rules applicable to all other civil litigation, Rule 301 must be applied to this case. Rule 301 dictates that because Petitioners articulated nondiscriminatory explanations for their conduct toward Hicks, the *McDonnell-Burdine* presumption should play no role in this case; rather, the sole issue to be decided is simply one of intentional discrimination.

Amici do not mean to suggest that a district court finding of intentional discrimination in this case would have constituted clear error. Indeed, one could rationally draw a strong inference of intentional discrimination from the fact that the explanation given by Petitioners for their conduct turned out to be false. One who gives false explanations for one's conduct generally has something to

hide, and in employment discrimination cases that something may well be invidious discriminatory intent. But it is certainly not the case that false explanations *always* are a pretext for intentional discrimination; employers may have strong reasons for hiding their motivations even when their actions did not violate civil rights laws (*e.g.*, when an employee's termination arguably violates a collective bargaining agreement).

The Court should reverse the Eighth Circuit's decision and remand the case to that court. The Eighth Circuit should then review under a clearly erroneous standard the district court's factual finding that Hicks failed to carry his evidentiary burden on the issue of intentional discrimination. Since the burden of persuasion must remain on Hicks at all times, the Eighth Circuit should be directed to consider all evidence that Petitioners did not act with invidious discriminatory intent (*e.g.*, evidence that Hicks's discharge was based on nonracial personal animosity or a desire to clean house among St. Mary's supervisory personnel) even though Petitioners may not have openly articulated those rationales for their behavior.

ARGUMENT

I. THE COURT OF APPEALS IMPROPERLY RELIEVED HICKS OF HIS BURDEN OF PERSUASION BY INTERPRETING THE EFFECT OF THE *McDONNELL-BURDINE* PRESUMPTION TOO STRONGLY

The ultimate issue in any federal employment discrimination suit brought, as here, under a disparate treatment theory is whether the plaintiff has demonstrated that his employer acted with invidious discriminatory intent. As the Court explained in *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983):

> The "factual inquiry" in a Title VII case is "[whether] the defendant intentionally discriminated against the plaintiff." *Burdine*, [450

> U.S.] at 253. In other words, is "the employer treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978), quoting *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

Aikens, 460 U.S. at 715.

To assist trial courts in making that ultimate determination, the Court has set forth a method (known as the "*prima facie* case" method) of ordering the presentation of evidence in a non-class action disparate treatment case brought under Title VII (or under 42 U.S.C. §§ 1981 or 1983). Thus, in *McDonnell Douglas* the Court outlined a three-part order of proof. First, a plaintiff meets his initial burden of persuasion by establishing a *prima facie* case of racial discrimination. That case is established by showing that: (1) the plaintiff belongs to a protected class; (2) he was qualified for the job he sought or hoped to retain; (3) despite his qualifications, he was rejected (or discharged); and (4) after his rejection (or discharge), the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications. *McDonnell Douglas*, 411 U.S. at 802. A plaintiff that establishes a *prima facie* case is held to have created a "presumption" that the employer unlawfully discriminated against him, because (the Court has concluded) it is reasonable to infer that the acts constituting a *prima facie* case, if otherwise unexplained, "are more likely than not based on the consideration of impermissible factors." *Furnco*, 438 U.S. at 577.

If a plaintiff establishes a *prima facie* case, the burden then shifts to the employer to articulate a nondiscriminatory reason for its conduct. *McDonnell Douglas*, 411 U.S. at 802. The defendant is not required, however, to persuade the court that it was actually motivated by the proffered reasons; rather, the employer meets its burden of production -- and successfully rebuts

the presumption created by the *prima facie* case -- by setting forth, through the introduction of admissible evidence, the reasons for its actions. *Burdine*, 450 U.S. at 254-255.

Once the employer meets its burden of production, the *McDonnell-Burdine* presumption "drops from the case" and "the factual inquiry proceeds to a new level of specificity." *Id.* at 255 & n.10. In other words, at that point the trial court's task is simply to determine, based on all the evidence, whether the plaintiff has met his burden of proving that his employer intentionally discriminated against him. *Aikens*, 460 U.S. at 715.

The plaintiff can attempt to meet that burden with *direct* evidence that the employer harbored an invidious discriminatory motive, or by *indirect* evidence -- such as that the reasons proffered by the employer for its actions are false. *Burdine*, 450 U.S. at 256. If the plaintiff demonstrates that the employer's proffered reasons are false, a trial court could reasonably conclude that those reasons were actually "a pretext for the sort of discrimination prohibited by [Title VII]." *McDonnell Douglas*, 411 U.S. at 804.

But nothing in this Court's decisions supports the Eighth Circuit's conclusion that a trial court is *required* to rule for the plaintiff once he establishes that the employer's proffered explanations are false. This Court has held repeatedly that to prevail in a disparate treatment employment discrimination case the plaintiff *must* demonstrate that the employer intentionally discriminated against him,[2] yet the Eighth Circuit's decision provides

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[2] This is not to say that the plaintiff must provide *direct* evidence of discrimination; the Court stressed in *Aikens* that a plaintiff also may prevail based on *indirect* evidence of discrimination. *Aikens*, 460 U.S. at 714 n.3. We note, however, that the district court in this case explicitly acknowledged that Hicks was not required to present direct evidence of racial discrimination in order to prevail (Pet. App. A29);

(continued...)

such plaintiffs with an entirely new method of prevailing in such cases: by showing that the employer has proffered false explanations for his actions. That simply is not the law. Title VII (and other federal civil rights laws) impose liability on employers for invidious discriminatory conduct, not for being less than candid with a court. Accordingly, the Eighth Circuit's holding -- that a plaintiff *must* prevail after debunking the employer's proffered reasons for its actions -- should be reversed.

Part of the confusion in this case stems from the use of the word "pretext." "Pretext" is logically, grammatically, and legally part of a prepositional phrase: a proffered motive is shown to be a "pretext for" a concealed motive. *Webster's Third New International Dictionary* 197 (1971). The Court consistently has limited its use of the word "pretext" in Title VII cases to only one type of concealed motive: a concealed motive based on invidious intentional discrimination. *See McDonnell Douglas*, 411 U.S. at 804 ("a pretext for the sort of discrimination prohibited by" Title VII); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) ("Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination"); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979); *Connecticut v. Teal*, 457 U.S. 441, 447 (1982). However, the district court in this case was using the word "pretext" in a broader sense, such that an employer's proffered reasons for its conduct are "pretextual" whenever they are false; *i.e.*, whenever the employer has *any* concealed motive for its conduct.

Because the district court was using the word "pretext" in a different sense from that normally used by this Court, it perhaps would have been wiser to use the word "false," rather than the word "pretextual," to

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[2] (...continued)
the district court simply found that Hicks's indirect evidence was insufficient to meet his evidentiary burden in this case.

describe Petitioners' proffered explanations regarding why Hicks was demoted and discharged. Nonetheless, it is clear from the district court's opinion that it did *not* find that Petitioners' proffered explanations were a pretext for racial discrimination. In the absence of such a finding, Hicks cannot prevail on his employment discrimination claims.

In sum, the burden of persuasion was on Hicks to demonstrate that Petitioners acted for racially discriminatory reasons. The district court found that Hicks failed to meet that burden. In light of that finding, the Eighth Circuit's holding that judgment must be entered for Hicks should be reversed.

II. THE COURT'S LIMITED CONSTRUCTION OF THE *McDONNELL-BURDINE* PRESUMPTION IS REQUIRED BY FRE 301

The result reached by the Eighth Circuit can be upheld only if one grants the *McDonnell-Burdine* presumption far more strength than this Court or Congress ever intended. Under the Eighth Circuit's view, the *McDonnell-Burdine* presumption is not destroyed by the employer's articulation of nondiscriminatory reasons for its actions, but rather is resuscitated by a showing that the employer's articulated reasons were not its true reasons. Pet. App. A10. That view of the *McDonnell-Burdine* presumption is at odds with the holdings of this Court that "the presumption drops from the case" once the employer has articulated nondiscriminatory reasons for its actions. *Burdine*, 450 U.S. 255 n.10.

Moreover, the limited weight accorded by the Court to the *McDonnell-Burdine* presumption is mandated by Rule 301 of the Federal Rules of Evidence.[3] The text and

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[3] Rule 301 provides:

(continued...)

legislative history of Rule 301 make clear that Congress did not intend to accord presumptions the expansive interpretation espoused by the Eighth Circuit.

A. General Procedural Rules, Including the Federal Rules of Evidence, Govern Employment Discrimination Litigation

This Court has stated numerous times that civil rights litigation is subject to the same procedural rules as other civil litigation. *Martin v. Wilks*, 109 S. Ct. 2180 (1989); *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2118 (1989)("usual method for allocating persuasion and production burdens in the federal courts"); *id.* at 2133 (Stevens, J., dissenting) ("Ordinary principles of fairness require that Title VII actions be tried like 'any lawsuit'"); *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775, 1792 (1989) (Brennan, J.) ("Conventional rules of civil litigation generally apply to Title VII cases"); *Patterson v. McLean Credit Union*, 485 U.S. 620 (1988) (per curiam) ("We do not believe that the Court may recognize any such exception to the abiding rule that it treat all litigants equally: that is, that the claim of any litigant for the application of a rule to its case should not be influenced by the Court's view of the worthiness of the litigant in terms of extra legal criteria"); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 718 (1983). *See also* 110 Cong. Rec. 7214 (1964)(Interpretive Memorandum submitted by Sen. Clark & Sen. Clifford)

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[3] (...continued)

Presumptions in General in Civil Actions and Proceedings. In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

("[T]he plaintiff, as in any civil case, would have the burden of proving that discrimination had occurred"). This recognition reflects the will of Congress manifested in the statutorily enacted Federal Rules of Evidence.

Accordingly, F.R.E. 301 (which governs use of presumptions) is fully applicable to the *McDonnell-Burdine* "*prima facie* case" presumption.[4] Presumptions are governed by Rule 301 in the absence of a statutory exception; and federal employment discrimination statutes do not create any such exceptions for disparate treatment cases.[5]

Rule 301 of the Federal Rules of Evidence, both as proposed and as adopted, governs all presumptions in civil litigation under federal statutes. The language of all of the draft versions of Rule 301 reflects that the rule was intended to govern all presumptions in civil litigation as a general matter. 1 D. Louisell & C. Mueller, *Federal Evidence* § 68 at 540. Only presumptions created specifically by Act of Congress and whose terms conflict with the provisions of the rule were excepted. 10 J.

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[4] The term "*prima facie* case" has two distinct meanings. It is sometimes used to denote the evidence necessary for a plaintiff to establish a rebuttable presumption of liability, the legal consequences of which are governed by Rule 301. It also refers to a more limited concept: it describes the plaintiff's burden of producing sufficient evidence to permit the trier of fact to infer the fact at issue. 9 J. Wigmore, *Evidence* § 2494 (3d ed. 1940). The Court has made clear that it is employing the former definition of "*prima facie* case" when using that term in the Title VII context. *Burdine*, 450 U.S. at 254 n.7. Indeed, the Court regularly has used the term "presumption" (as opposed to the weaker term, inference) in its discussion of the effect of establishment of a "*prima facie* case" in employment discrimination cases. *See, e.g., id.*, at 255 n.8.

[5] No court has ever held that the *McDonnell-Burdine* presumption is excepted from Rule 301 coverage. We note that while a few courts have entertained the notion that there is such a thing as a non-statutory exception to Rule 301, those decisions are in a distinct minority, and none touch upon Title VII disparate treatment law. 1 D. Louisell & C. Mueller, *Federal Evidence* § 68 at 540 (1977).

Moore, *Moore's Federal Practice* ¶ 301.02, at III-14 ("If the statute does not declare the effect [of a presumption] then . . . Rule 301 would govern"). As to all other presumptions, including presumptions created by common law or judicial construction and accorded greater weight by those sources, Rule 301 would govern. *See Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 208 (1973); *Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, 51 F.R.D. 315, 336 (1971); 10 J. Moore ¶ 301.03[2], at III-18.

In the debates over Rule 301, and with respect to the Federal Rules of Evidence in general, there was no suggestion that these rules would not apply to Title VII. There is also no suggestion in the legislative history of the rules of evidence that Title VII itself provided for a different treatment of presumptions. Indeed, the language of the rule was modified twice to ensure that it would apply to all civil proceedings, and apply to no criminal matters. There is no suggestion that Congress intended to reverse the Court's preference for a uniform treatment for presumptions, except where "otherwise provided for by Act of Congress." *See* Subcommittee Note, Subcomm. on Crim. J., House Comm. on the Judiciary, 93rd Cong., 1st Sess. (Committee Print (1973)), reprinted in *Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 221, 256 (1973) (hereinafter "*House Hearings*"); 9 J.H. Wigmore, *Evidence in Trials at Common Law* § 2493f, at 328 (quoting 18 A.L.I. Proceedings at 226).

B. Rule 301 of the Federal Rules of Evidence Follows the View of Presumptions Propounded by Professor Thayer

For much of this century, legal scholars have debated the weight that ought to be accorded to legal presumptions. The more expansive view of the legal effect of

presumptions has long been associated with Professor E. M. Morgan, while a far more limited view of the effect of presumptions is associated with Professor James B. Thayer and his followers. Both the language and legislative history of Rule 301 make clear that Congress, in adopting the Federal Rules of Evidence, adopted the limited Thayer approach to presumptions. The approach adopted by the Eighth Circuit -- which granted stronger effect to the *McDonnell-Burdine* presumption and relieved Hicks of a portion of his burden of persuasion -- is wholly inconsistent with the Thayer approach codified by Congress in the Federal Rules of Evidence.

In order to make clear just how inconsistent the Eighth Circuit's approach is with the approach mandated by Rule 301, *amici* believe that a somewhat detailed review of events leading up to adoption of Rule 301 is warranted.[6]

In the years preceding enactment of the Federal Rules of Evidence, legal scholars had debated the proper operational effect of presumptions. The two primary theories were that championed by Professors Thayer and J.H. Wigmore, and that championed by Professors Morgan and McCormick. Professors Thayer and Wigmore argued that a presumption shifted merely the burden of production or "articulation" of evidence, but not the burden of persuasion, and then vanished upon the introduction of evidence that would support a finding of the non-existence of the presumed fact. J.B. Thayer, *Preliminary Treatise on Evidence at the Common Law* 336 (1898) (reprinted by Augustus M. Kelley, 1969). Professors Morgan and McCormick believed that a presumption shifted both the burden of production and the burden of persuasion. E.M. Morgan, *Basic Problems of Evidence* 36 (1961). While

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[6] For a more detailed history, *see* Beard, *Title VII and Rule 301: An Analysis of the Watson and Atonio Decisions*, 23 Akron L. Rev. 105 (1989).

there were other theories,[7] most participants in the debate were convinced that the choice was between Thayer and Morgan. J.B. Weinstein and M.A. Berger, *Weinstein's Evidence*, § 300[01], at 300-5, (quoting 18 A.L.I. Proceedings 210-213 (1941). Ultimately, the Advisory Committee (appointed by Chief Justice Warren in 1965 to formulate rules of evidence for the federal courts) recommended that the view of presumptions advocated by Professor Morgan be accepted over the view of Professor Thayer. This recommendation was accepted by the Court. F.R.E. 301 Advisory Committee's Note. The language of the proposed rule gave presumptions virtually the effect of an affirmative defense. Weinstein, § 300[03], at 530.

The view of presumptions championed by Professors Morgan and McCormick provided that presumptions were created for reasons of policy rather than probability; therefore, a presumption should "permanently alter the burden of persuasion. No matter how much contradictory evidence was introduced indicating the nonexistence of the presumed fact, the burden of persuasion was always on the adverse party." *Rules of Evidence: Hearings on H.R. 5463 Before the Senate Committee on the Judiciary*, 93d Cong., 2d Sess. 138 (1974)(hereinafter "*Senate Hearings*")(Statement of Richard H. Keatinge, Chrmn., Cal. Evid. Law Rev. Comm'n). This view of presumptions enjoyed substantial support among the academic community. *See, e.g.*, 1 Louisell & Mueller § 65 at 522-523.

Professor Thayer had advocated the so-called "bursting bubble" theory in which a presumption vanishes upon the introduction of evidence that would support a finding of the nonexistence of the presumed fact. The Court rejected the Thayer theory as according presumptions too "slight

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[7] *See, e.g.*, Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. Pa. L. Rev. 307 (1920).

and evanescent an effect." Advisory Committee Note Rule 301, quoted in Weinstein at 301-313.[8]

The recommendation of the Advisory Committee and the Court to adopt the Morgan approach met with substantial opposition on the grounds that a Morgan presumption shifted too great a burden of proof. Weinstein, § 301[01], at 301-18 to 301-19 & n.2. The House of Representatives adopted a compromise between the Morgan theory and Thayer theory. *See* 10 J. Moore, *Moore's Federal Practice*, ¶ 301.01[7], at III-11 (2d ed. 1988). Although supported by several powerful groups (including the Association of Trial Lawyers of America), the House compromise was in turn also severely criticized and made little headway in the Senate. *See Senate Hearings* at 56-58 (statements by the Standing Committee on Rules of Practice and Procedure and the Advisory Committee on Rules of Evidence of the Judicial Conference of the United States, criticizing the House compromise).

During the Senate's consideration of Rule 301, substantial support for the Thayer-Wigmore "bursting bubble" theory was submitted. One Thayer supporter, Congressman David W. Dennis, stated:

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[8] Edward W. Cleary, Reporter for the Advisory Committee on the Federal Rules of Evidence, argued against the bursting bubble theory on the basis that "presumptions embody the same considerations of fairness, policy, and probability that underlie the process of allocating responsibility for the elements of a case between the plaintiff and defendant in the guise of *prima facie* case and affirmative defense, and therefore are entitled to greater effect than accorded by the bursting bubble theory." *House Hearings* at 92. *See* Morgan and Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev. 909, 913 (1937). Professor Morgan described the minimum proof needed to rebut a Thayer presumption as being "some testimony is put in which anybody can disbelieve, which comes from interested witnesses, and which is of a sort that is usually disbelieved . . . evidence which may be disbelieved by the trier of fact." 9 Wigmore § 2493j, at 328 (quoting Professor Morgan, 18 A.L.I. Proceedings 221-222).

> . . . In my view a presumption simply imposes on the party against whom it is directed the burden of going forward with the evidence -- and that is all it does. The burden of proof never shifts. The presumption disappears when countervailing evidence is introduced. The problem is one of the most complicated in the law of evidence; but I believe this is sound theory, and that calling it a "bursting bubble" does not make it less so.

Senate Hearings at 12.

Similarly, Richard H. Keatinge, Former Chairman, California Evidence Law Revision Commission, supported the bursting bubble theory explicitly:

> Adoption of the "bursting bubble theory" will encourage the use of presumptions. . . . [T]he use of presumptions in this manner will still serve to expedite trials. . . . The minute controverting evidence is introduced the presumption should disappear . . . . Once controverting evidence is introduced the presumption ceases to have any value. In our California code we have the specific provision that presumptions are not evidence and they affect merely the burden of producing evidence. . . . [I]f we have to make a choice it would definitely be the "bursting bubble theory," because once the controverting evidence is introduced, as a practical matter, you know that the jury or the judge is going to look at both sides of the case anyway, and, as a practical matter, I don't care how the instruction is given, or how you handle it, both sets of evidence, both for and against the basic facts, are going to get weighed by the finder of fact whether a jury or judge. Therefore, as a practical matter, if you have to make a choice, the "bursting bubble" is the choice.

Id. at 196-197 (Testimony of Richard A. Keatinge). The Thayer rule had previously been accepted by the American Law Institute and the Model Code of Evidence. Weinstein, § 300[01] at 300-5.

In the face of increasing support for the Thayer approach, the Senate rejected both the Morgan approach and the House compromise and instead adopted a version of Rule 301 that essentially was the Thayer "bursting bubble" approach. The Senate version of Rule 301 (which was *identical* to Rule 301 as finally enacted) read:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with the evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

120 Cong. Rec. 36925 (1974).[9]

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[9] The Senate Report on Rule 301 was critical of the House version of the rule as well as the Supreme Court's recommendations. It read in part:

> The rule governs presumptions in civil cases generally. . .
>
> As submitted by the Supreme Court, presumptions governed by this rule were given the effect of placing upon the opposing party the burden of establishing the non-existence of the presumed fact, once the party invoking the presumption established the basic facts giving rise to it.
>
> Instead of imposing a burden of persuasion on the party against whom the presumption is directed, the House adopted a provision which shifted the burden of going forward with the evidence. They further provided that "even though met with contradictory evidence, a presumption is sufficient evidence of the fact presumed, to

(continued...)

The conference committee appointed to iron out difference between the House and Senate versions of Rule 301 accepted the Senate language. The Conference Report describes the effect of that decision:

> The House bill provides that a presumption in civil actions and proceedings shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut it. Even though evidence contradicting the presumption is offered, a presumption is considered sufficient evidence of the presumed fact to be considered by the jury. The Senate amendment provides that a presumption shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut the presumption but it does not shift to that party the burden of persuasion on the existence of the presumed fact.

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[9] (...continued)
be considered by the trier of fact." The effect of the amendment is that presumptions are to be treated as evidence.

> The committee feels that the House amendment is ill-advised. . .
>
> . . . The effect of the rule as adopted by the committee is to make clear that while evidence of facts giving rise to a presumption shifts the burden of coming forward with evidence to rebut or meet the presumption, it does not shift the burden of persuasion on the existence of the presumed facts. The burden of persuasion remains on the party to whom it is allocated under the rules governing the allocation in this first instance.
>
> The court may instruct the jury that they may infer the existence of the presumed fact from proof of the basic facts giving rise to the presumption. However, it would be inappropriate under this rule to instruct the jury that the inference they are to draw is conclusive.

S. Rep. No. 1277, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7055-56.

> Under the Senate amendment, a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may presume the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.

H. R. Conf. Rep. No. 1597, 93rd Cong., 2d Sess., *reprinted in* 1974 U. S. Code Cong. & Admin. News 7098, 7099.

While the conference committee language is somewhat ambiguous regarding the meaning of Rule 301, one thing is clear: Congress decisively rejected the Morgan view of presumption that had been recommended to it by the Court. Indeed, to the extent that the conference committee's understanding of Rule 301 can be said to deviate from the Thayer view, it is not toward a stronger view of the effect of a presumption (the Morgan view) but toward a lesser view of the effect of a presumption in which a finding for the plaintiff is not compelled, but merely permitted ("*may* presume the existence of the presumed fact"), when the defendant fails to offer any contradicting rebuttal evidence. *See* Belton, *Burdens of Pleadings and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 Vand. L. Rev. 1205, 1235-36 (1981).

In sum, the history of adoption of Rule 301 makes clear not only that Congress favored giving decreased effect to presumptions, but also that it knew precisely what it was doing. Both the Advisory Committee and the

Supreme Court had recommended adoption of the Morgan view, so Congress was well aware of the views of those who criticized the Thayer approach. It was aware, for example, of Professor Morgan's criticism (*see* Note 8, *supra*) that a Thayer presumption is defeated by *any* admissible rebuttal evidence, even evidence that is inherently unbelievable and that is, in fact, disbelieved by the trier of fact. Yet, despite that awareness, Congress still opted for the Thayer approach.

The Eighth Circuit's interpretation of the *McDonnell-Burdine* presumption cannot be squared with the Thayer approach. Under the Thayer approach, the *McDonnell-Burdine* presumption should have dropped totally from this case the moment Petitioners presented evidence of a nondiscriminatory motive for Hicks's demotion and discharge. It makes no difference under the Thayer approach how credible and credited Petitioners' evidence was. A presumption does not require the opposing party to carry any burden of persuasion or to present evidence meeting *any* minimum credibility standards; it is enough under the Thayer approach if the opposing party comes forward with *some* relevant evidence which, if believed, would support a finding contrary to the presumed fact.[10]

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[10] Under Rule 301, the *prima facie* case disappears from the case once it is rebutted and has no further effect in the litigation. *See* 1 Louisell & Mueller, § 69 at 555; E.M. Morgan, *Basic Problems in Evidence* 34-35 (1961); Weinstein, § 300[01], at 300-3. This evidence must be more than "a scintilla," but need not in fact be believed. *See House Hearings* at 92 (Statement of Edward W. Cleary). Professor Morgan describes the minimum proof needed to rebut a Thayer presumption as being "some testimony is put in which anybody can disbelieve, which comes from interested parties, and which is of a sort that is usually disbelieved ... evidence which may be disbelieved by the trier of fact." 9 Wigmore, § 2493f at 328 & n.6 (*quoting* 18 A.L.I. Proceedings 221-222). Professor Cleary described the "bursting bubble" theory as being that "a presumption disappears from the case upon the introduction of evidence sufficient to support of findings of the nonexistence of the presumed fact, even though no one believes that evidence." *House Hearings* at 92. The case is decided as though there had never been a presumption or a prima facie case. In a jury (continued...)

The Eighth Circuit erred in holding that the presumption of racial discrimination sprung back to life the moment Hicks demonstrated that Petitioners' rebuttal evidence was false, because in doing so the court of appeals was placing on Petitioners far more than simply a burden of producing evidence.

C. Burdine Recognizes that Rules 301 Adopts the Thayer View

Whatever doubt may have existed regarding the meaning of Rule 301 and its applicability to employment discrimination cases was laid to rest in *Burdine*. Writing for the Court in *Burdine*, Justice Powell left no cause for doubt that Congress -- in amending proposed Rule 301 -- fully accepted the view of presumptions as articulated by Thayer in 1898, the "bursting bubble" view of presumptions.

Justice Powell's discussion of the nature of the evidentiary burden placed upon a defendant in a disparate treatment employment discrimination lawsuit (written six years after adoption of the Federal Rules of Evidence) could have come straight out of Professor Thayer's treatise. *See Burdine*, 450 U.S. at 252-256. Indeed, in support of his statements that the employer in a Title VII case "rebut[s]" the *prima facie* case presumption by setting forth evidence of nondiscriminatory reasons for its conduct, that the presumption thereafter "drops from the case," and that thereafter "the factual inquiry proceeds to a new level of inquiry," Justice Powell cites explicitly to Thayer's treatise. *Id.* at 255 & n.10.

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[10] (...continued)
case, the word "presumption" and its effects would not even be mentioned in jury instructions. Morgan, at 40-42; Weinstein, § 300[01], at 300-4-300-5; § 301[02], at 301-29.

The Court's subsequent decision in *Wards Cove Packing Co. v. Antonio*, 109 S. Ct. 2115 (1989), made explicit the Court's reliance on Rule 301 in assigning evidentiary burdens in employment discrimination cases. The Court said:

> This rule [assigning the burden of persuasion on the issue of discrimination to the plaintiff *at all times* in an employment discrimination case] conforms with the usual method for allocating persuasion and production burdens in the federal courts, see Fed. Rule Evid. 301, and more specifically, it conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration. *See [Burdine]*.

Wards Cove, 109 S. Ct. at 2126.[11]

In sum, this Court's decisions make clear that the Court accepts the applicability of Rule 301 to disparate treatment employment discrimination cases in general and to the *McDonnell-Burdine* presumption in particular. Under Thayer and Rule 301, there can be no doubt that the *McDonnell-Burdine* presumption, like any other presumption, has no further effect once the employer comes forward with some evidence (no matter how credible that evidence is later judged to be) that articulates a nondiscriminatory rationale for the employer's action. In light of Rule 301, the Eighth Circuit's decision to the contrary should be reversed.

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[11] The *Wards Cove* dissent, while disputing the applicability of Rule 301 to disparate impact cases, agreed that Rule 301 applies to cases (such as disparate treatment cases) that involve "shifting of evidentiary burdens upon establishment of a presumption." *Wards Cove*, 109 S. Ct. at 2132 n.18 (Stevens, J., dissenting).

III. APPLICATION OF RULE 301 TO THE *McDONNELL-BURDINE* PRESUMPTION DOES NOT UNFAIRLY HAMPER PLAINTIFFS

Application of Rule 301 to the *McDonnell-Burdine* presumption cannot fairly be criticized as overly burdensome on employment discrimination plaintiffs. Even without the expansive interpretation accorded it by the Eighth Circuit, the presumption still serves important functions in assisting a disparate treatment employment discrimination plaintiff to meet his burden of persuasion.

First, the *McDonnell-Burdine* presumption permits a plaintiff to prevail automatically if the employer fails to come forward with a nondiscriminatory explanation for its disputed conduct. Second, by forcing the employer to explain itself, the presumption assists the plaintiff in focusing the case on the employer's actual motivations. Moreover, forcing the employer to explain itself increases the plaintiff's opportunities to create inferences of invidious discrimination; for example, if the plaintiff can demonstrate that the employer's explanation is false, it is reasonable to infer that the employer was being deceitful in order to mask invidious discrimination.

Most importantly, because Rule 301 is based on considerations of probability, not policy, application of the rule does not deprive the plaintiff of the benefit of the evidence he introduced for purposes of establishing his *prima facie* case. After the presumption raised by a *prima facie* case of disparate treatment is rebutted, the basic facts that gave rise to the *prima facie* case are still available to show intent:

> In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial

> evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether or not the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

Burdine, 450 U.S. at 255 n.10.

Undoubtedly, it would be easier for plaintiffs to prevail in disparate treatment employment discrimination cases if the Eighth Circuit's interpretation of the *McDonnell-Burdine* presumption were adopted by the Court. But any such adoption would be at the expense of a basic tenet of disparate treatment employment discrimination law: that a plaintiff may not prevail in a disparate treatment case without demonstrating that the employer acted with invidious discriminatory intent.

That basic tenet has met with virtually universal acceptance among the Justices. For example, Justice Stevens, in his dissenting opinion in *Wards Cove* (joined by Justices Blackmun, Brennan, and Marshall), stated:

> In a disparate treatment case *there is no "discrimination" within the meaning of Title VII unless the employer intentionally treated the employee unfairly because of race*. Therefore, the employee retains the burden of proving the existence of intent at all times. If there is direct evidence of intent, the employee may have little difficulty persuading the factfinder that discrimination has occurred. But in the likelier event that intent has to be established by inference, the employee may resort to the *McDonnell/Burdine* inquiry. In either instance, the employer may undermine the employee's evidence but has no independent burden of persuasion.

Wards Cove, 109 S. Ct. at 2131 (Stevens, J., dissenting) (emphasis added). *But see Aikens*, 460 U.S. at 718 (Blackmun, J., concurring).

The Eighth Circuit's opinion suggests at least two methods by which a disparate treatment plaintiff may prevail without carrying his burden of persuasion on the issue of invidious discrimination. One method is to show that the employer has provided the trial court with a false explanation for its conduct. Pet. App. A10. The other method suggested by the Eighth Circuit is to show that the employer acted as a result of some "personal," non-business-related motivation. *Id.* Acceptance of either of those methods would overturn decades of employment discrimination law, by basing Title VII disparate treatment liability on something other than a finding of discrimination on the basis of race, color, religion, sex, or national origin.

It bears repeating that evidence of the type which the Eighth Circuit contends *mandates* entry of judgment for the plaintiff is undoubtedly evidence from which a trial court could reasonably infer invidious discriminatory motive. But it is just as plain that *not every employer* that is less than candid to a court about its motives (or that allows personnel decisions to be made based on "personal" motives) has acted with invidious discriminatory intent. Accordingly, a trial court ought to be permitted to review all of the evidence in determining the ultimate issue of discriminatory intent.

The trial court determined, after reviewing all of the evidence, that Hicks failed to demonstrate by a preponderance of the evidence that Petitioners discriminated against him on the basis of race. In the absence of a holding that the district court's finding was clearly erroneous, it should have been affirmed.

The purpose of our civil rights laws is to prohibit employment decisions based on race, color, religion, sex,

or national origin, not to restrict or regulate non-invidious employment decisions. Any conclusion that disparate treatment liability can be based on proof of something other than invidious discrimination not only is without support in the legislative history of the relevant statutes and the decisions of this Court, but also contradicts the rhetorical and moral bases advanced in the past 50 years in support of such enactments.

CONCLUSION

Amici respectfully request that the judgment of the United States Court of Appeals for the Eighth Circuit be reversed.

Respectfully submitted,

Hugh Joseph Beard, Jr.
THE EQUAL OPPORTUNITY FOUNDATION
1747 "S" Street, NW
Washington, DC 20009
(202) 543-0411

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
1705 "N" Street, NW
Washington, DC 20036
(202) 857-0240

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